No. 77-763

In the Supreme Court of the United States

OCTOBER TERM, 1977

WALTER S. BRACKETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
SIDNEY M. GLAZER,
LOUIS M. FISCHER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

237-463—78——1

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-763

WALTER S. BRACKETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the panel of the court of appeals (Pet. App. 21) is not reported. The opinion of the court of appeals on rehearing *en banc* (Pet. App. 1–19) is reported at 567 F. 2d 501.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975, and was affirmed on rehearing *en banc* on July 18, 1977. The Chief Justice extended the time for filing a petition for a writ of certiorari to November 28, 1977, and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court's decision in *Kent* v. *United States,* 383 U.S. 541, should be applied retroactively.

2. Whether this Court's decision in *Dorszynski* v. *United States,* 418 U.S. 424, should be applied retroactively.

3. Whether petitioner's claim that the sentencing court improperly took into consideration prior convictions was presented with sufficient specificity to require the district court to hold an evidentiary hearing.

STATEMENT

On November 7, 1960, petitioner was indicted for first degree murder in connection with an assault that caused the death of a guard at the National Training School for Boys (Pet. App. 2). At the time, he had been convicted on at least three previous occasions, twice in state courts and once in federal court (Pet. C.A. Brief 42–43, n. 17). In the course of his murder trial before the Honorable Alexander Holtzoff, in the District Court for the District of Columbia, petitioner pleaded guilty to the lesser offense of manslaughter. Judge Holtzoff subsequently sentenced petitioner, who was then fifteen years old, to a term of five to fifteen years' imprisonment (Pet. App. 2-3).

Petitioner was twice paroled, and his parole was twice revoked for commission of subsequent criminal offenses. After his third release on parole, petitioner

was again convicted on state charges, and he is now serving a state sentence. Because of his history of parole violations, petitioner still has a significant portion of his 1961 sentence left to serve (Pet. 8 n. 4).

In 1969, petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence. After allowing that motion to lay dormant for several years, petitioner renewed it in 1974 (Pet. App. 47–57). The district court denied the motion without a hearing (Pet. App. 20), and the court of appeals affirmed by order (Pet. App. 21). Following rehearing *en banc* on the issue of the retroactivity of this Court's opinion in *Dorszynski* v. *United States,* 418 U.S. 424, the court of appeals again affirmed (Pet. App. 1–19).

ARGUMENT

1. Petitioner argues (Pet. 13–19) that he is entitled to the retroactive application of this Court's decision in *Kent* v. *United States,* 383 U.S. 541. In that case, this Court held that a juvenile was entitled to notice, a hearing, and assistance of counsel before the juvenile court for the District of Columbia could waive its jurisdiction. Petitioner apparently seeks to have his case remanded so that a new waiver hearing may be held (Pet. 19), although he is now 32 years old (Pet. 5 n.1) and therefore outside the jurisdiction of the juvenile court. Petitioner points to a split among the circuits and state courts in urging review. We submit that the holding in *Kent* should not be applied retroactively, and that in light of the diminishing importance of the question, there is no need for review by this Court.

We note at the outset that by pleading guilty in the adult court, petitioner waived his claim that his juvenile waiver hearing did not meet statutory or constitutional standards. See *Smith* v. *Yeager,* 459 F. 2d 124 (C.A. 3); *Wilhite* v. *United States,* 281 F. 2d 642, 644 (C.A.D.C.) (Burger, J.); *cf. Tollett* v. *Henderson,* 411 U.S. 258; *Brown* v. *Cox,* 481 F. 2d 622, 628 n.16 (C.A. 4) (*en banc*), certiorari denied, 414 U.S. 1136.

In any event, *Kent* should not be given retroactive effect. Whether a ruling of this Court in a criminal case is made retroactive turns on (1) the purpose of the new rule, (2) the extent of the reliance by the courts or other authorities on the old rule, and (3) the effect of retroactive application on the administration of justice. See, *e.g., Michigan* v. *Payne,* 412 U.S. 47; *Stovall* v. *Denno,* 388 U.S. 293. In particular, the Court has focused on whether the *major* purpose of the new rule is " 'to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials.' " *Hankerson* v. *North Carolina,* 432 U.S. 233, 243 (emphasis in original); *United States* v. *Peltier,* 422 U.S. 531, 535; *Williams* v. *United States,* 401 U.S. 646, 653.

The rule announced in *Kent* was not intended to contribute to the accuracy of the truth-finding process, nor did it correct a practice that raised serious questions about the accuracy of guilty verdicts in prior cases. Instead, *Kent* merely established that the waiver hearing was a sufficiently important stage of

the criminal process to require certain procedural protections, even though it did not in any way affect the determination of guilt or innocence. As the Ninth Circuit stated in *Harris* v. *Procunier,* 498 F. 2d 576, 579:

> First, a certification hearing is not a trial, but a hearing. Juvenile proceedings are not intended to be adversarial. Second, the function of a certification hearing is not to gather facts for the purpose of conducting criminal proceedings against the juvenile, but to determine whether it would be proper for the juvenile court to continue to assert jurisdiction over the juvenile. While we in no way discount the thrust of *Kent* to provide due process guarantees at the certification hearing, we do not see that it is the type of constitutional rule which is directed at, or in any way impairs, the truth-finding function.

See also *Brown* v. *Wainwright,* 537 F. 2d 154, 156–157 (C.A. 5), certiorari denied, 430 U.S. 970.

Petitioner seeks support for his contention in *McConnell* v. *Rhay,* 393 U.S. 2, and *Arsenault* v. *Massachusetts,* 393 U.S. 5, in which this Court held retroactive the right to counsel at arraignments at which pleas are entered and defenses may be waived, and at deferred sentencing proceedings. Both of these settings, however, are unlike a juvenile waiver hearing in that they directly involve questions going to guilt or innocence. An uncounseled plea or waiver of an affirmative defense may result in the conviction of a defendant otherwise legally entitled to a verdict of not guilty. And in the deferred sentencing procedure,

as the Court pointed out in *Mempa* v. *Rhay,* 389 U.S. 128, 136–137, the defendant's continued liberty often turns on a factual determination of guilt or innocence of subsequent, uncharged criminal conduct. The juvenile waiver hearing, by contrast, does not involve a determination of guilt or innocence, but merely resolves whether the juvenile or adult system will make that determination.

The retroactivity question here is therefore much more like that presented in *Adams* v. *Illinois,* 405 U.S. 278, than that presented in the cases relied on by petitioner. In *Adams,* this Court held that even though a preliminary hearing is a "critical stage of the criminal process" at which the defendant is constitutionally entitled to counsel, see *Coleman* v. *Alabama,* 399 U.S. 1, that rule would not be applied retroactively because the purposes of the rule did not bear sufficiently on the factfinding process at trial. 405 U.S. at 281. Because the juvenile waiver hearing is similarly unrelated to the truth-finding process, the rights established by *Kent* should not be held retroactive.

Petitioner is correct that there is a split in the circuits on this issue, but the split is of diminishing importance and does not require resolution by this court. The Fourth Circuit early held *Kent* retroactive, *Kemplen* v. *Maryland,* 428 F. 2d 169, but every other circuit that has considered the question has ruled that *Kent* should not be given retroactive effect, and this Court has denied certiorari on each

occasion.[1] Even the Fourth Circuit has significantly retreated from its original position on the matter. *Brown* v. *Cox,* 481 2d 622 (C.A. 4) (*en banc*), certiorari denied, 414 U.S. 1136. There is no need for review by this Court now.

Several additional factors present in this case cut against applying *Kent* retroactively here. First, petitioner's offense was so serious and his lack of amenability to the juvenile correctional process so clearly apparent that it may be said with confidence that a juvenile waiver hearing with full *Kent* procedural protections would not have produced a different result. Petitioner was indicted for first degree murder (Pet. 5), and the sentencing court described the offense as particularly gruesome (Pet. App. 29; Tr. 201). A remand under these circumstances would therefore be meaningless. *Brown* v. *Wainwright, supra,* 537 F. 2d at 157–158; *Harris* v. *Procunier, supra,* 498 F. 2d at 579; *Brown* v. *Cox, supra,* 481 F. 2d at 627–628; *Mordecai* v. *United States, supra,* 421 F. 2d at 1138.

Second, the retroactive application of *Kent* in this and other similar cases would have an adverse effect on the administration of justice. Petitioner is now 32 years

[1] See *Mordecai* v. *United States,* 421 F. 2d 1133 (C.A.D.C.), certiorari denied, 397 U.S. 977; *Harris* v. *Procunier,* 498 F. 2d 576 (C.A. 9) (*en banc*), certiorari denied, 419 U.S. 970; *Brown* v. *Wainwright,* 537 F. 2d 154 (C.A. 5), certiorari denied, 430 U.S. 970. See also, *Smith* v. *Yeager,* 459 F. 2d 124, 127 (C.A. 3) (suggesting that full retroactivity for *Kent* would be inappropriate).

257-463—78——2

old and beyond the jurisdiction of the juvenile court. Not only would a waiver hearing be difficult to reconstruct, but assuming that it is found that waiver should not have been granted, the remedy petitioner seeks is full release. Although such a remedy was contemplated as a possible result in *Kent* itself, it should not automatically be applied in cases in which the juvenile waiver preceded the announcement of the rule in *Kent*. Yet assuming that full release is not the proper course, there is no real remedy available to petitioner at this point. As the Fifth Circuit in *Brown* v. *Wainwright* correctly noted (537 F. 2d at 157):

> [I]f we should determine that the juvenile court judge's decision to waive jurisdiction was improper, we have no appropriate remedy to grant Brown. Obviously, the juvenile court cannot now take over Brown's case, in that it no longer possesses jurisdiction over him and its attempts to now offer "non-punitive" rehabilition to a 27 year old man who has been in prison for twelve years and who has three more sentences to serve would be ludicrous.

See also *Harris* v. *Procunier, supra,* 498 F. 2d at 579; *Mordecai* v. *United States, supra,* 421 F. 2d at 1138.

Finally, petitioner's claim arises on a collateral challenge to his conviction, which further militates against applying *Kent* retroactively here. See *Hankerson* v. *North Carolina, supra,* 432 U.S. at 264–248 (Powell, J., concurring in the judgment); *Mackey* v. *United States,* 401 U.S. 667, 675–702 (Harlan, J.); *Williams* v. *United States,* 401 U.S. 646, 665–666 (Marshall J., concurring in part and dissenting in part).

2. For many of the same reasons, there is no merit to petitioner's claim that this Court's decision in *Dorszynski* v. *United States,* 418 U.S. 424, should be given retroactive application here.

In *Dorszynski,* this Court held that it would require district courts, in electing not to sentence under the Youth Corrections Act, to make an explicit finding that the defendant would not benefit from youth offender treatment. The Court made it clear that the Youth Corrections Act was not intended to limit the district court's sentencing discretion or to confer a substantive right on the youth offender to particular sentencing treatment. The only purpose of requiring an explicit finding of "no benefit," the Court held, was to relieve the appellate courts from having to determine from the record in each case whether an implicit finding of no benefit had been made and thus whether the district court had been aware of and had actually exercised its discretion in electing not to sentence under the Youth Corrections Act. 418 U.S. at 443–444. See also *Owens* v. *United States,* 383 F. Supp. 780, 785–787 (M.D. Pa.), affirmed, 515 F. 2d 507 (C.A. 3), certiorari denied, 423 U.S. 996. The rule announced in *Dorszynski* thus does not even remotely contribute to the accuracy of the fact-finding process or serve to "overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Williams* v. *United States, supra,* 401 U.S. at 653. Instead, it merely facilitates the very narrow appellate inquiry as to

whether the district court has exercised its discretion in sentencing the youthful offender.

In this case, because the court of appeals found that the district judge had not made an explicit finding of no benefit, it examined the record and concluded that an implicit finding had been made. The district court was thus found to have properly exercised its statutory discretion under the Youth Corrections Act; all that the court of appeals found missing was the explicit finding that would have made the appellate court's job easier. To contend that a defendant enjoys a right to a more explicit finding than was made here, and that the right to that finding should be applied retroactively on collateral attack to invalidate his sentence, is to read much more into *Dorszynski* than is there. See *Jackson* v. *United States,* 510 F. 2d 1335, 1337 (C.A. 10).

We submit, initially, that the sentencing court's explicit reference to the Youth Corrections Act and its express finding that sentencing under that Act was inappropriate would be sufficient to satisfy the requirements of *Dorszynski,* even if that case were held to apply retroactively. In *Dorszynski,* the Court stated (418 U.S. at 444):

> Literal compliance with the Act can be satisfied by any expression that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act.

At sentencing, counsel for petitioner specifically requested that the court sentence under the Youth

Corrections Act (Pet. App. 41), and the court specifically declined to do so (Pet. App. 43), noting that petitioner "needs incarceration in a maximum security institution" (Pet. App. 43). While it doubtless would have been preferable for the sentencing court to have used the precise terms of the statute in exercising its sentencing discretion, the incantation of the statutory formula is not required by *Dorszynski.* See *United States* v. *Silla,* 555 F. 2d 703, 707–708 (C.A. 9); *McKnabb* v. *United States,* 551 F. 2d 101, 105 (C.A. 6); *United States* v. *Scruggs,* 538 F. 2d 214 (C.A. 8). In *Dorszynski,* the Court vacated the sentence because it was unclear from the record whether the sentencing court realized the defendant was eligible for sentencing as a youth offender. Here, by contrast, the record makes it clear beyond cavil that the court realized it had the choice and deliberately chose to sentence petitioner as an adult.

Even if the sentencing court's findings were not sufficient to satisfy the "explicit finding" requirement of *Dorszynski,* that should not be grounds for vacating petitioner's 1961 sentence. The disparity between what *Dorszynski* requires—even giving that case its most generous construction—and what was done here is so minimal as to call for application of the principles of harmless error. Moreover, while there is, as petitioner contends, a technical split in the circuits on the question of the retroactivity of *Dorszynski,* the split is not as sharp as petitioner suggests, and the matter is not of sufficient importance to require resolution by this Court.

Petitioner relies on decisions by the Fourth, Fifth, and Eighth Circuits giving *Dorszynski* retroactive effect.[2] The Fourth and Fifth Circuits, however, have applied *Dorszynski* retroactively without any analysis of the issue. See *McCray* v. *United States,* 542 F. 2d 1246 (C.A. 4); *Robinson* v. *United States,* 536 F. 2d 1109 (C.A. 5); *Hoyt* v. *United States,* 502 F. 2d 562 (C.A. 5).

Of the three courts that have applied *Dorszynski* retroactively, only the Eighth Circuit has discussed the issue, and that court has required only a very limited inquiry on the part of the sentencing judge in response to a collateral attack on a sentence for failure to satisfy the requirements of *Dorszynski.* See *Brager* v. *United States,* 527 F. 2d 895 (C.A. 8). Under the Eighth Circuit's ruling, if the sentencing judge is able to make explicit findings that he considered the applicability of the Youth Corrections Act at the time of sentencing and determined that the defendant would not benefit from sentencing under the Act, *Dorszynski* would be satisfied. Moreover, the court noted that this determination could ordinarily be made without holding an evidentiary hearing and without having the defendant present in court. *Brager* v. *United States, supra,* 527 F. 2d at 898–899.

[2] By contrast, the Second, Third, Tenth and District of Columbia Circuits have held the principles of *Dorszynski* non-retroactive. See *United States* v. *Kaylor,* 491 F. 2d 1133 (C.A. 2) (*en banc*), vacated on other grounds *sub nom. United States* v. *Hopkins,* 418 U.S. 909; *Owens* v. *United States,* 383 F. Supp. 780 (M.D. Pa.), affirmed, 515 F. 2d 507 (C.A. 3), certiorari denied, 423 U.S. 996; *Jackson* v. *United States,* 510 F. 2d 1335 (C.A. 10); see also *Bailey* v. *Holley,* 530 F. 2d 169, 173 (C.A. 7).

The Eighth Circuit's rule would ordinarily not have a significantly adverse affect on the administration of justice, since it would usually require only a *nunc pro tunc* supplementation of the record by the sentencing judge.[3] In cases such as this one, however, where the sentence is an old one and the sentencing judge has died, the burden is substantially greater. In those cases, the new judge would apparently be required to vacate the original sentence or to hold a hearing to redetermine whether the defendant would have obtained no benefit from sentencing as a youth offender.[4] In light of the substantially greater burden involved in such cases, we submit that the decision of the court of appeals in this case to apply *Dorszynski* only to cases still on direct appeal was a sensible and proper accommodation of the policies underlying retroactivity law.[5]

3. Petitioner's final claim (Pet. 25–28) is that the sentencing court took into consideration prior convictions allegedly obtained in violation of his right to

[3] That is precisely what has happened in a series of Eighth Circuit cases following *Brager.* See *Rivera* v. *United States,* 542 F. 2d 478; *DeVerse* v. *United States,* 536 F. 2d 804, certiorari denied, 429 U.S. 897; *Tasby* v. *United States,* 535 F. 2d 464.

[4] We note that the Eighth Circuit in *Brager* did not discuss these problems of remedy in cases in which the sentencing judge was no longer available, but left them for the district court to wrestle with. *Brager* v. *United States, supra,* 527 F. 2d at 899.

[5] In any event, it appears likely that even the Eighth Circuit would not have found a violation of *Dorszynski* here. In a decision following *Brager,* that court held that a sentencing judge's comments that were very similar to the comments made in this case satisfied the "explicit finding" requirement of *Dorszynski. United States* v. *Scruggs,* 538 F. 2d 214.

counsel, contrary to this Court's decision in *United States* v. *Tucker*, 404 U.S. 443. Although the sentencing court focused primarily on the seriousness of the offense, the court did note that petitioner had "a bad record before this present commitment" (Pet. App. 42–43).

In his Section 2255 motion, petitioner alleged simply that at the time of sentencing "the trial judge took into consideration past convictions of plaintiff (although he was a juvenile) when he was not represented by counsel" (Pet. App. 48, 52). The government responded (Pet. App. 64) that this conclusory statement, which failed to allege specifically what prior convictions the court had relied on and in what manner the court had relied on them, was insufficient to entitle petitioner to a hearing under Section 2255. The district court, by order (Pet. App. 20), agreed with the government that no hearing was required.

The district court was correct in not holding a hearing on the basis of petitioner's conclusory allegation. Although Section 2255 provides that the district court shall hold a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," a hearing is not required unless the motion contains sufficient factual allegations to support the claim for relief. *Sanders* v. *United States*, 373 U.S. 1, 19; *Torres* v. *United States*, 469 F. 2d 651 (C.A. 9); *United States* v. *Lowe*, 367 F. 2d 44 (C.A. 7); *Martin* v. *United States*, 248 F. 2d 651, 652 (C.A.D.C.). A denial on this ground, of course, is not a denial on the merits, and petitioner is

apparently free to present his claim, with appropriate specificity, to the district court. Review by this Court is therefore unnecessary and unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
SIDNEY M. GLAZER,
LOUIS M. FISCHER,
Attorneys.

MARCH 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978